



www.cdt.org

P +1-202-637-9800
F +1-202-637-0968
E info@cdt.org

September 15, 2014

I. Introduction.

We applaud the FCC's desire to consider the appropriate regulatory structure to maintain Internet openness in the wake of the DC Circuit decision vacating the agency's 2010 rules. A free and open Internet is essential to the exercise of individual liberty in the digital age.

As we said in our initial comments in this proceeding:

"A policy framework in this area should have a simple but crucial goal: to preserve the availability of basic Internet service that operates in an evenhanded manner, and thus creates a decentralized and broadly accessible platform for speech and innovation. Such a framework need not and should not be unreasonably restrictive or burdensome for network operators; indeed, it would likely permit experimentation with additional or different services or business models, so long as "plain vanilla" Internet access service is not displaced.

"The key elements of such a policy by now should be relatively well understood. They include some form of a no-blocking rule; some restrictions on discrimination among lawful Internet traffic; and some allowance for reasonable network management and special delivery arrangements (what the 2010 rule termed "specialized services") that don't undermine the Internet offering.

"A sound policy framework for protecting the open nature of the Internet requires several key elements:

1. *An anti-blocking rule...*
2. *General expectation of nondiscrimination for Internet service...*
3. *Allowance for reasonable network management...*
4. *Flexibility for different/additional data delivery models that don't "squeeze out" ordinary Internet access...*
5. *Clarity regarding scope.*

II. Alternatives Available to the Commission.

We believe that all available regulatory options should be considered, including Title II reclassification, Section 706 authority, and a range of hybrid proposals. In our prior comments, we examined the pros and cons of both Title II and Section 706. While both of these remain real options, both have significant shortcomings inherent in the structure and in the likelihood of speedy implementation. As the support for Title II have been well documented in the majority of comments submitted, we would like to augment the record with a discussion of several

proposals that draw upon, or are hybrids of, Title II and Section 706, and several implementation issues applicable to any approach.

A. A new alternative to “commercially reasonable.”

As we discussed at length in our prior comments, a “commercially reasonable” standard is inappropriate for open Internet rules, and the Commission should consider alternative formulations. Modifying the Commission’s proposed legal standard could strengthen protections for the Internet user and clarify the intent and norms the Commission seeks to reinforce. CDT agrees with the Commission’s observation that “[s]ound public policy requires that Internet openness be the touchstone of a new legal standard.”¹ But rather than formulating a new standard, the Commission initially proposed to import the “commercially reasonable” standard from the data-roaming context.

An innovative approach would be to articulate a new standard that is tailored to the particular aims of this proceeding and that is based upon the compelling public policy and societal need underpinning an open Internet. Picking a shorthand label or catchphrase for such a standard is less important than articulating its content, but CDT would suggest that a standard might require practices to be “consistent with Internet openness” or prohibit practices that would tend to “undermine Internet openness.”

The Commission could then explain that a practice will be considered to violate this standard if substantial adoption of the practice would tend to undermine:

- (i) the traditional and practical ability of broadband Internet access subscribers to access and use the lawful Internet content, applications, services, and devices of their choice without interference from their provider of broadband services; or
- (ii) the traditional and practical ability of developers of independent online content, applications, services, or devices to make those offerings available to interested Internet users everywhere without having to negotiate for or obtain any kind of permission or agreement from those users’ providers of Internet service.

Alternative formulations are possible, but the legal standard should reflect the intent of open-Internet policy and the public’s interest in an Internet that fosters free expression, accumulation of knowledge, freedom of association and movement, and a policy architecture that maximizes public engagement in digital life and online communities, discourse, and commerce.

B. Title II/Section 706 Hybrid Approach.

If the Commission chooses not to revisit the statutory classification of broadband Internet access service at this time, then the Commission might consider a hybrid approach that builds upon the recent DC Circuit decision and some of the strengths of Title II and Section 706. Section 706 authority could be utilized to adopt rules regarding broadband Internet access service, augmented with new policies focused on the second side of broadband providers’

¹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (rel. May 15, 2014) (hereinafter “NPRM”), ¶ 116.

service, following the DC Circuit's finding that network operators effectively provide a service to all the websites and Internet content providers the operators' subscribers choose to access.

The DC Circuit's holding that broadband providers "furnish a service to edge providers"² presents an opportunity to consider open-Internet policy from a new angle. A new policy expressly addressing this edge-facing service that carriers provide could augment the Commission's proposed rules.

The Commission's proposed rules, like the 2010 rules, apply to "broadband Internet access service," defined in relevant part as the "capability to transmit data to and receive data from all or substantially all Internet endpoints." This is a reasonable description of the functionality broadband providers provide to subscribers: Subscribers get the ability to send and receive traffic to and from the entire Internet. That includes not only the carriage of traffic over the broadband provider's own network, but also the onward forwarding of traffic over other networks with which that broadband provider has arranged to interconnect.

The definition is not, however, an accurate description of the functionality broadband providers provide to edge providers (i.e., the websites and other providers of online content or services that Internet subscribers choose to access). What edge providers get from each broadband provider is more limited: not the ability to reach the entire Internet, but rather the ability to reach the subscribers of that particular broadband provider. And the service is limited to carriage across the broadband provider's own network. Edge providers make their own arrangements, via their own Internet access, transit providers, or content delivery networks, for the delivery of traffic to and from the edge of the broadband provider's network. The edge-facing service of the broadband provider is to carry that traffic between the interconnection point and the relevant subscribers across its own local network.

In short, what Internet carriers provide to edge services is different from what they provide to subscribers, and it does not meet the definition of broadband Internet access service. This disparity did not concern the Commission prior to *Verizon v. FCC*, because the Commission's position was that broadband providers only provided service to their subscribers. Edge providers were not considered to be customers or recipients of a service from broadband providers.

Now that the DC Circuit has rejected that position, it is appropriate for the Commission to consider this edge-facing service as a distinct offering warranting distinct analysis. The Commission has an opportunity to craft an appropriate definition of these services and develop an appropriate policy framework for them – a framework which may augment whatever open Internet rules the Commission adopts for "subscriber-side" services.³

² *Verizon v. FCC* at 51.

³ CDT suggests defining edge-facing service as follows, modeled on the definition of broadband Internet access service but diverging from it where appropriate: "a service by wire or radio that provides the capability to transmit and receive data across the provider's own network to and from subscribers of the provider's broadband Internet access service, including any capabilities that are incidental to and enable the operation of the communications service."

This definition would be consistent with the DC Circuit's discussion that perhaps "the relevant service that broadband providers furnish [to edge providers] is access to their subscribers generally."³ At base, the service broadband providers provide to edge providers is the ability to communicate with the broadband provider's subscribers.

There are at least two ways that a focus on edge-facing service, thus defined, could contribute to a policy framework to promote the open Internet.

Possible applicability of Title II (as suggested in Mozilla petition)

One option is discussed in Mozilla's May 5 petition.⁴ As set forth in that petition, there is a strong argument that the edge-facing functionality that broadband carriers provide could qualify as a telecommunications service subject to Title II. The service that edge providers receive consists exclusively of the transmission of traffic across the broadband provider's network. On the Internet side, the transmission function does not come bundled with any of the other services (email, newsgroups, website hosting, etc.) that were key to the Commission's decision to classify subscriber side services as information services. The main question would be whether edge-facing service can be considered to be provided "for a fee," possibly on a theory that carriers receive valuable consideration for the exchange and carriage of edge provider traffic via interconnection agreements or subscriber revenues, or possibly if carriers start charging edge providers directly, as Verizon told the DC Circuit it intended to start doing.⁵

Classifying edge-facing service under Title II would not require the Commission to reverse prior classification decisions, for the simple reason that the Commission has not previously recognized the existence of such a service and hence has had no occasion to consider its regulatory treatment. Now that the DC Circuit has ruled that broadband carriers do provide a service to edge providers, it would be perfectly reasonable for the Commission to consider how those services might be treated under the statute. And the fact that the Commission has judged the subscriber side of broadband (the only side it previously recognized) as information services is no bar to different treatment of the Internet side. The DC Circuit has observed that "one may be a common carrier with regard to some activities but not others."⁶

As discussed above with respect to the option of full reclassification of broadband Internet access service, applying Title II would not automatically create a complete policy framework. Rather, it would provide the Commission with a stable base of authority to craft appropriate nondiscrimination rules for edge-facing service. Such rules could be based on provisions of Title II, on section 706, or both. Importantly, however, they would not be subject to the common-carrier prohibition that doomed the Commission's 2010 rules. They would also need to be coupled with extensive forbearance, as many provisions of Title II would not be sensible to apply to edge-facing services.

Linking the concepts of individualized negotiations and specialized services

Alternatively, focusing on edge-facing service may provide a new avenue for an open-Internet policy framework to avoid the common carrier prohibition, even without classifying edge-facing

⁴ Mozilla Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act, May 5, 2014, <https://blog.mozilla.org/netpolicy/files/2014/05/Mozilla-Petition.pdf>.

⁵ See *Verizon v. FCC* at 37 (quoting Verizon's counsel from the oral argument transcript at 31: "but for [the Open Internet Order] rules we would be exploring those commercial arrangements.").

⁶ *NARUC v. FCC*, 533 F.2d 601, 608 (DC Cir. 1976).

service under Title II. The idea would be to link the concepts of individualized negotiations on the Internet side with the offering of specialized services to subscribers, so that specialized services become the vehicle for creating the flexibility in terms that the DC Circuit has held the common carrier prohibition to require.

The 2010 rules allowed broadband providers to offer specialized services in addition to broadband Internet access service. Thus, there was always some potential for edge providers and broadband providers to negotiate special delivery arrangements. In litigating *Verizon v. FCC*, however, the Commission never pointed to the allowance for specialized services as a possible source of the “substantial room for individualized bargaining and discrimination in terms”⁷ necessary to distinguish the Commission's rules from common carriage.

The challenge facing such an argument would have been that the Commission's approach treated broadband Internet access service and specialized services as distinct, and the case concerned the permissible regulatory treatment of the former standing alone. But even if the two services are treated as distinct on the subscriber side, they need not be treated that way on the Internet side. If the relevant edge-facing service is defined consistently with our proposal above and with the DC Circuit's suggestion in *Verizon v. FCC*⁸ – in effect, as the provision of a capability to reach a broadband provider's subscribers, without regard to the precise manner or quality of transmission – then the edge-facing service could include the transmission of traffic to subscribers via both regular Internet service (standard transmission) and specialized service (e.g. including quality-of-service guarantees). The overall edge-facing service would be transmission, with different options constituting tiers of service that “permit broadband providers to distinguish somewhat among edge providers.”⁹

In other words, the Commission could consider a regime under which, as per the DC Circuit's suggestion, a broadband provider would be required to provide a baseline level of service to all edge providers, while still retaining some flexibility to negotiate for special treatment in individual cases. The Commission could require such special arrangements, however, to be provided in a manner consistent with specialized services treatment on the subscriber side. Under such a regime, there would be flexibility for special deals, but not unlimited flexibility. The constraint would depend on the definition of specialized services.¹⁰

The end result of this kind of approach could be a policy framework that in principle could be similar to the 2010 rules. Edge providers would be entitled to a standard level of access to

⁷ *Cellco Partnership v. FCC*, 700 F.3d at 548.

⁸ See *Verizon v. FCC* at 61 (suggesting that “the relevant ‘carriage’ broadband providers furnish [to edge providers] might be access to end users more generally,” rather than access at any particular level of speed or service).

⁹ *Verizon v. FCC* at 61.

¹⁰ The 2010 order did not define specialized services. CDT believes that a definition should include at least two components. First, there should be a requirement that the service be truly specialized, in the sense of serving a specific and limited purpose. Second, there should be a technical requirement of logical separation – that is, wholly or significantly separate capacity – between the specialized traffic and the Internet traffic. If the specialized service traffic were completely comingled with Internet traffic, it would not be meaningful to characterize it as a service provided as an addition or alongside the subscriber's Internet service. CDT discussed the appropriate definition of specialized services at much greater length – and offered a specific proposal – in our October 2010 comments to the Commission.¹⁰

broadband subscribers. They could also try to negotiate special arrangements with broadband providers. To avoid violating the rules, though, such special arrangements would need to be carried as specialized services to and from subscribers, rather than being comingled with ordinary broadband Internet access traffic.

As the Commission noted in 2010, permitting special treatment via specialized services carries some policy risks. The Commission would need to carefully monitor the marketplace for signs that specialized services are "retarding the growth of or constricting capacity available for broadband Internet access service."¹¹ But integrating specialized services into the analysis of how much leeway open Internet rules leave for individualized negotiations, and considering the issue through an edge-facing lens, may create a new opening to argue that rules quite similar to the 2010 rules could nonetheless be consistent with the approach the DC Circuit suggested might pass muster.

III. Overarching Issues.

A. The rules adopted should apply in large part to mobile Internet access service.

The Commission's proposed rules could also be improved by extending them fully to mobile Internet access service. The allowance for reasonable network management provides ample flexibility for carriers to address any network management challenges that are specific to mobile wireless networks, so no broad exemption is warranted.

This is not to say that technological or structural considerations on which the Commission has requested comment in the past are irrelevant. But the best approach is to account for any such considerations in the rules' *application*, not in substantive differences.

This may be especially true for rules based on section 706, which would provide room for individually negotiated arrangements and would only bar discrimination that is "commercially unreasonable" (in the NPRM's formulation) or that "undermines Internet openness" (CDT's suggested formulation). To the extent that 706-based rules already include more flexibility than the 2010 rule, there would be even less reason to exempt mobile Internet access from their reach.

B. The Commission should cabin its policy focus to the provision of physical transmission functions, and expressly disclaim authority over Internet content and applications.

Whichever legal approach the Commission elects to take, the agency should narrowly focus its regulatory activity on the services that provide the transmission links that connect subscribers to the Internet. The Commission should expressly disclaim regulatory authority over the content, applications, and services that run over the Internet.

The purpose of this proceeding is to preserve the Internet as a transmission medium that is equally open and available to an essentially unlimited array of content, applications, and services. Central to that goal is the simple premise that *carriers providing connections to the*

¹¹ 2010 Order ¶ 114.

Internet should not limit choices or play favorites. Open-Internet protections, therefore, should apply specifically and exclusively to providers of Internet access service.

The Commission should state clearly that whatever authority it asserts in this proceeding does not and likely cannot extend to the myriad over-the-top services that the Internet enables. Doing so would help safeguard the open and vibrant Internet, by ensuring that the Commission's approach to this proceeding, far from laying the groundwork for broader Internet regulation, actually serves as a bulwark against it.

C. The Commission should clearly articulate the compelling societal and public interest.

As the Commission has noted repeatedly over the course of these proceedings, protecting Internet openness furthers at least three important government interests: promoting infrastructure investment, promoting competition between online services, and protecting Internet users' ability to receive and share the content of their choice.¹² Congress has enacted statutes placing significant priority on these aims: Section 706 expresses Congress' judgment that broadband deployment is an important goal of government policy, and section 230 of the Communications Act endorses the policy goals of promoting the continued development of interactive computer services, vibrant competition between such services, and user control over what information they access.¹³ Even as it vacated the 2010 Rules, the DC Circuit recognized the strong policy purposes motivating Commission action to preserve Internet openness.¹⁴

In particular, assuring that Internet users and innovators retain the ability to exercise their First Amendment rights online, to speak and receive speech without interference from the broadband providers that have bottleneck control over their high-speed access to the Internet, is not merely an important, but indeed a compelling government interest. As *Turner I* affirmed, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."¹⁵ "Indeed," the Court continued, "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."¹⁶

The roots of this recognition that protection of First Amendment rights is itself an important government interest can be found much farther back than *Turner*. As Justice Black previously articulated:

It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . Surely a command that the government itself shall not impede the free flow of ideas does

¹² See, e.g., NPRM ¶ 25 *et. seq.*

¹³ 47 USC § 230(b).

¹⁴ *Verizon v. FCC*, at 35–44 (explaining how "[t]he Commission's finding that Internet openness fosters the edge-provider innovation that drives this 'virtuous cycle' was likewise reasonable and grounded in substantial evidence.")

¹⁵ *Turner I*, 512 U.S. at 663.

¹⁶ *Id.* (internal quotation marks omitted); see also Marvin Ammori, *First Amendment Architecture*, 2012 Wisc. L. Rev. 1, 15–18 & n.68 (citing scholarship exploring the constitutionality of media and telecommunications policies furthering the speech interests of users, viewers, callers, and listeners).

not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.¹⁷

As the Commission has amply demonstrated, broadband providers' ability to act as gatekeepers and discriminate against lawful content and applications that Internet users would otherwise be able to communicate to each other poses clear risk to both edge-based innovators' continued ability to compete as well as Americans' ability to exercise their free speech rights online. Addressing that threat is unquestionably an important and substantial government interest.

Open Internet rules focused on the provision of broadband Internet access would be narrowly tailored to serve these government interests, while restricting no more speech than is necessary (if any). The Commission rightly proposes to apply the rules only to providers of broadband Internet access, whose unique physical control of a communications conduit creates the potential for a bottleneck that could enable content gatekeeping. And such rules would have even less impact on broadband providers' speech than the must-carry rules ultimately upheld in *Turner*. There, cable operators' own speech was burdened by the fact that the must-carry rules deprived them of the use of channels that they otherwise could have used to transmit their own speech or speech chosen by them.¹⁸ With broadband Internet access, there is no channel scarcity to consider: rules requiring broadband providers to remain open to the full array of content and services available on the Internet do not similarly require those broadband carriers to forego creating or transmitting any particular content.

D. The Commission should specifically reserve the right to take further action.

We encourage the Commission to address the potential that further action may be required to address current or unanticipated challenges to the fundamental public interest in maximizing access to and engagement with an open Internet. The Commission should reserve the possibility of ongoing Commission scrutiny or future action.

Should the Commission chose a Section 706-based approach, the Commission also could indicate that its framework should be viewed as an initial measure, taken in the interest of moving quickly to fill the policy vacuum left by the DC Circuit decision. The agency could indicate that, in the event it later chooses to pursue Title II or any other legal approach to authority, it would likely modify its rules to fill gaps and, possibly, take a more restrictive approach to discrimination.

* * *

CDT appreciates the opportunity to comment on these important policy issues. The Internet's openness has enabled it to serve as an unprecedented platform for free expression and innovation. We thank the Commission for its commitment to preserving that openness, and look forward to helping craft effective and lasting protections for individuals.

¹⁷ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹⁸ See *Turner I*, 512 U.S. at 675 (O'Connor, J., dissenting).

Respectfully submitted,

Nuala O'Connor
Center for Democracy & Technology
1634 I St., NW, 11th Floor
Washington, DC 20006
(202) 637-9800

September 15, 2014